

REMARKS

The Examiner rejected independent Claim 1 as being obvious in view of the combined teachings of the Finley et al. and Bainbridge et al. references "with reference to" the Lemieux et al. reference. This rejection is respectfully traversed.

At the outset, it is unclear what the Examiner means by the term "with reference to" in connection with the Lemieux et al. reference. If the Examiner intended to state that the independent Claim 1 was based upon the combined teachings of the Finley et al., Bainbridge et al., and Lemieux et al. references, it is requested that she state so unambiguously. Clarification is requested.

The applicant renews its argument that the Bainbridge et al. reference is non-analogous art to the claimed invention and, therefore, should not be considered. It is uncontroverted that the field of art of the Bainbridge et al. reference (namely, protective padding for sports gear) is quite different from the field of art of the claimed invention (namely, acoustic underlayments for flooring). Thus, the only remaining issue is whether the Bainbridge et al. reference is reasonably pertinent to the particular problem with which the inventor was concerned.

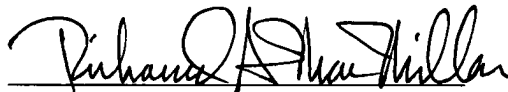
The problems addressed by the Bainbridge et al. reference (namely, the challenges of providing a padding that can repeatedly absorb and dissipate impact forces, while still being lightweight, breathable, washable, and easily integrated into sports gear and not unduly inhibiting an athlete's movements and dexterity on the field) are quite different from the problems addressed by the claimed invention (namely, the issues of sound absorption, low sound transmission, and moisture control). Thus, the applicant has raised a prima facie case that the Bainbridge et al. reference is non-analogous art to the claimed invention.

In her previous responses to this argument, the Examiner stated that the Bainbridge et al. reference was "reasonably pertinent to the particular problem with which [the] applicant was concerned, namely a padding layer of closed-cell foam material." The Examiner's analysis is flawed on its face because a "padding layer of closed-cell foam material" is not a problem - it is an article of manufacture. It is believed that the Examiner is confusing the standard of analogous art (which is

focused on the problems faced by the applicant) with the standard of patentability (which is focused on the structure disclosed in the reference). The prohibition of using non-analogous art in a rejection is a threshold issue that is determined not with reference to the structures disclosed in the reference, but the problems that were faced and addressed by the reference. When properly in this light, the use of the Bainbridge et al. reference as prior art to the claimed invention is improper.

The same arguments for patentability apply to independent Claims 31 and 45 in the application, which are also patentable for the same reasons. Thus, it is believed that the application is in condition for allowance.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard S. MacMillan", written over a horizontal line.

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